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No. 32,750.

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In the Supreme Court of Ohio

ALICE M. HALLIDAY,
Administratrix of the Estate of Janet M. Halliday,
Deceased,
Plaintiff-Appellant,

vs.

THE YORK-LAKE CO., *et al.,*
Defendants-Appellees.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

STATEMENT.

The appellees, Union Properties, Inc., Sylvester T. Dailey, Alice L. Dailey, Rollo V. Lais, Marvel Window Cleaner, Inc., Cleveland Metal Fabricating Co., and Edward B. Meyer, having heretofore filed their joint Statement in Opposition to Appellant's Statement as to Jurisdiction, together with a Motion to Dismiss or Affirm, appellant files this, her reply brief thereto, under the provision of Rule 7, paragraph 3, of the Rules of Practice of the Supreme Court of the United States.

ARGUMENT.

The gist of appellees' joint Statement is that no substantial Federal question is involved and this in turn is predicated on the doctrine of res judicata. Consequently, this brief is directed to the question of the applicability of the doctrine of res judicata.

I. The Doctrine of Res Judicata Is Not Available to the Appellees as a Defense.

Needless to say, before the doctrine of res judicata can be properly availed of by a party as a defense it is essential that the parties, issues and facts in former litigation alleged to constitute res judicata be properly and specifically pleaded; and, further, that if such party fails so to plead, the defense is deemed waived. *Clark v. Baranowski,* 111 Ohio St. 436, 145 N. E. 760; *Meiss v. Gill,* 44 Ohio St. 253, 6 N. E. 656; *Harding v. Talbott,* 60 Ohio App. 523, 22 N. E. (2d) 221.

The record here does not disclose compliance with the foregoing requirement, and hence appellant submits that appellees cannot avail themselves of such doctrine as a defense to appellant's action.

II. The Doctrine of Res Judicata Does Not Apply.

Appellees admit that the three corporations were not made parties to the foreclosure proceedings (Appellees' Statement, top page 5) nor made parties to the Torrens proceedings (Appellees' Statement, middle page 5), but assert that since appellant's predecessors in interest, in their capacities as administrators, were made parties to both proceedings, appellant is now precluded from bringing this action on the ground of res judicata.

The fallacy in such argument is manifest when it is noted that the basic issue in the instant case, to-wit, the ownership by the corporations of their equities of redemption in and to certain lands, was not at all pleaded or passed upon in those proceedings; it may have been tacitly, but erroneously, assumed therein that the corporations had

been divested of the ownership; such assumption would be wholly unwarranted. Since the tacit assumption was unwarranted and erroneous, the three corporations not having been made parties to said two prior proceedings, were not and could not be affected by them, and they still possess their equities. This issue of ownership was in no way explicitly involved in said former proceedings. Thus the within action involves issues substantially different from any heretofore litigated.

True, appellant, to a certain extent, is here seeking a determination of the corporations' rights, but the prime purpose is to benefit the Estate of which she is the present administratrix and the nature of her action—declaratory judgment and directions and instructions to her as a fiduciary—is particularly appropriate to that end; the issues now made are new. Moreover, the Court will observe that the three corporations have not in the least questioned the propriety of such procedure. See *Norwood v. McDonald,* 142 Ohio St. 299, 52 N. E. (2d) 67, where at page 307 of the State reporter, the court said:

> "No claim or right of a litigant can be asserted as conclusive under the doctrine of res judicata unless it was considered and determined or necessarily determined to be valid through the rendition of a former judgment. 'Where a judgment or decree is relied on by way of evidence, as conclusive per se, between the parties in a subsequent suit, it must appear by the record of the former suit, that the particular controversy sought to be precluded was therein necessarily tried and determined.' Lessee of Lore v. Truman, 10 Ohio St., 45."

Appellees likewise seek to invoke the doctrine of res judicata on the ground that the ostensible grantee of the

three corporations, i.e. Midland Properties Co., one of the defendants here, was a party to the Torrens proceedings and therefore "the grantors [referring to the three corporations] can have no rights that are not barred by the registration decree" (Appellees' Statement, page 9). (Matter in brackets added.) But, obviously litigation to which the grantors were not parties is not and can not be binding on the grantors nor can the issues therein adjudicated be deemed res judicata as to the grantors' rights. *Freeman on Judgments* (5th Ed.), § 442, p. 969.

It should also be observed that appellees' denial of knowledge on the part of defendant, Union Properties, Inc. "of any claims asserted by the three corporations" (Appellees' Statement, page 9) is itself effectually refuted by their own statement on the very same page to the effect that the corporations' purported grantee, Midland Properties Co., was made a party to the Torrens proceedings. If it had no knowledge of any claims having been made by the three corporations after the foreclosures, then why was their grantee, the Midland Properties Co., made a party? To this there is no answer, for Midland Properties Co. must have been made a party on an examination of the title records which disclosed the purported conveyances to Midland by the corporations, which of necessity would suggest the claims of the corporations. The record here also shows that for years the corporations have claimed the equities of redemption, as Union Properties Inc. has at all times very well known.

Moreover, with respect to the purported conveyances by the three corporations to Midland Properties Co., it will be seen from the record of this case that appellant con-

tends that said conveyances are void and she is seeking a declaration to that effect.

CONCLUSION.

For the reasons stated it is respectfully submitted that the doctrine of res judicata is not here involved; that appellees have failed to show that no substantial Federal question is presented; and that, since appellees have failed to disclose any grounds making against the jurisdiction of this Court, this Court does have jurisdiction and appellees' motion to dismiss or affirm should be overruled.

Respectfully submitted,

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